



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 11 OF 2016

ROSE MUTHIANI MUTHOKI.....1ST APPELLANT
CHRISTOPHER SUMBI KAVOLO.....2ND APPELLANT
JOHN MUTIE KIMOLO3RD APPELLANT
MARRIETA KAMENE KAVEVO.....4TH APPELLANT
MARGARET NGWEBE NGWESE5TH APPELLANT
ROSINA NTHENYA MASYUKO6TH APPELLANT
YOANA KALONDU KITILA7TH APPELLANT
JUSTINA KALEKYE KIMONDIU8TH APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and Sentence of the Senior Resident Magistrate’s Court at Kilungu by Hon. P. Wambugu (SRM)) in

Criminal Case No. 255 of 2014 dated 18th February, 2016)

JUDGMENT OF THE COURT

Introduction

1. The Petition of Appeal herein was filed on **2nd March, 2016** and Amended by a Petition of Appeal dated and filed on **19th July, 2016**. The amendment merely removed or struck out the names of the 3rd to the 7th appellants, leaving the first and 8th appellants. By the time of the hearing of the appeal on 12th December, 2016, all other appellants had withdrawn their appeal save for the 8th appellant whose appeal is the subject matter of this judgment.

The Appeal

2. The appeal is premised on the grounds set out in the Petition being that the conviction was based on insufficient or lack of evidence, and the accused person was condemned without being heard. The appellant's counsel **Mr. Mbullo** filed submissions to the appeal on 23rd September, 2016. However, **Mr. Machogu** for the State made oral submissions in court.

3. **Mr. Machogu** in his oral submission conceded to the appeal, citing **Article 50(2) (k) of the Constitution** which guarantees a fair trial to every accused person. That right includes the right to adduce and challenge evidence. **Mr. Machogu** conceded that the appellant was not accorded a fair trial for the reasons that after the close of the prosecution's case at the trial stage all the eight (8) accused persons were put on their defence and they elected to adduce sworn evidence. The defence counsel then submitted that it was not necessary to call all accused persons to tender their evidence during defence. On that basis the trial court proceeded to take evidence of the 1st and 2nd accused persons and left out the rest of the accused persons including the appellant. **Mr. Machogu** concluded that the appellant was not accorded a fair trial and that the conviction should be set aside or a re-trial be ordered.

4. Because the appeal has been conceded, I will not go into the submission of **Mr. Mbullo** for the appellant, except his objection to a re-trial as submitted by the State. It is submitted for the appellant that no grounds have been given for a re-trial. Counsel for the appellant submitted that the appellant was jailed for three (3) years part of which has been served. The witnesses will not be readily available and that in any event the appellant should not be made to pay for the incompetence of the judicial officer who conducted the trial.

Determination

5. I have carefully considered the issue of a re-trial. My view is that an issue like a re-trial requires much thought and consideration. It is the opening up of a case afresh. Before the court may order a re-trial, the following factors must be carefully considered

- i. The nature of the charge
- ii. The sentence being served by the appellant.
- iii. Availability of witnesses.
- iv. Need for further investigations.
- v. Where there are several accused persons –whether all have appealed.
- vi. Convenience to the parties.

6. A re-trial is not a casual issue. The prosecution must convince the court for need of a re-trial. A re-trial can only be resorted to in order to salvage justice, and where there is overwhelming chance of a re-trial succeeding. It cannot be used to restart a case based on faulty grounds. Substantial justice demands that the prosecution makes a convincing case, complete with supporting case law. Considering the factors which I have stated above, I do not think this court has been satisfied to order a re-trial as prayed by the prosecution.

7. In the upshot, the appeal before the court is allowed, and the appellant is forthwith set free unless lawfully withheld.

That is the judgment of the court.

.....

E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF FEBRUARY, 2017

.....

DAVID KEMEI

JUDGE

In the presence of:

Court Assistant – Kimonge

Muhula – for Mbullo for Appellant

Saoli – for Respondent